BRUCE M. LEWIS

IBLA 2001-318 Decided March 20, 2002

Appeal from a decision, styled as a notice of immediate suspension, issued by the Acting Field Manager, Yuma, Arizona, Field Office, Bureau of Land Management, requiring the removal of all obstacles, barriers, and signs restricting access to and on public lands pursuant to the use and occupancy regulations at 43 CFR Subpart 3715. AZA 30757.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Surface Uses

   The regulations at 43 CFR 3715.7-1 identify the four types of enforcement actions that BLM may take if the requirements of 43 CFR Subpart 3715 are being violated. They are issuance of (1) an immediate suspension (43 CFR 3715.7-1(a)), (2) a temporary cessation order (43 CFR 3715.7-1(b)), (3) a permanent cessation order (43 CFR 3715.7-(b)), and (4) a notice of noncompliance (43 CFR 3715.7-1(c)).

2. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Surface Uses

   The regulations authorize BLM to order an "immediate, temporary suspension" in two circumstances: (1) all or part of the use or occupancy is not reasonably incident or is not in compliance with various listed regulations and "an immediate, temporary suspension is necessary to protect health, safety or the environment" (43 CFR 3715.7-1(a)(1)) or (2) occupancy is being conducted under a determination of concurrence and there is a failure to meet any of the standards in 43 CFR 3715.3-1(b) or 43 CFR 3715.5(b), (c), or (e), all of which relate to the obtaining of Federal, state, or local permits or approvals. (43 CFR 3715.7-1(a)(2).) When BLM issues a "notice of immediate suspension" requiring that all obstacles, barriers, and signs restricting access to and on public lands be removed, but the record fails to show the existence of the circumstances necessary

to support such a requirement, the notice will be set aside.

3. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Surface Uses

When occupancy is not being conducted under a determination of concurrence and BLM issues a "notice of immediate suspension" requiring that all obstacles, barriers, and signs restricting access to and on public lands be removed, the record must show that removal is necessary to protect health, safety, or the environment. If the record fails to do so, the notice will be set aside.

APPEARANCES: Bruce M. Lewis, agent for Lewis Mining Company, Sun City West, Arizona; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Bruce M. Lewis, as agent for Lewis Mining Company, has appealed a decision, styled as a notice of immediate suspension, issued by the Acting Field Manager, Yuma Field Office, Bureau of Land Management (BLM), dated June 12, 2001, advising him that certain obstacles, barriers, and signs restricting access to and on public lands were unauthorized and in violation of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732 (1994), and regulations at 43 CFR Subpart 3715. 1/ The Acting Field Manager ordered Lewis to remove all such obstacles, barriers, and signs within 15 days of receipt of the decision.

Lewis has also petitioned to stay the effect of BLM's decision pending consideration of the appeal. Our review of the record to determine whether a stay should be granted resulted in our consideration of issues going to the merits of this appeal; thus, in the interest of judicial economy we have proceeded to decide this appeal.

Lewis is a co-owner of four claims located in secs. 21 and 24, T. 4 N., R. 21 W., Gila and Salt River Meridian, La Paz County, Arizona, and identified in the record as LMC #1 and LMC #2, located on June 13, 1997, and LMC #3 and LMC #4, located on September 10, 1997. The record does not include the location notices, but there is some indication in the

1/ In various places in the record Bruce M. Lewis identifies himself as owner or agent of Lewis Mining Company. In the appeal, he states that he is appealing as agent for Lewis Mining Company. BLM's decision was issued to Bruce M. Lewis, personally. All references in our decision to "Lewis" are to Bruce M. Lewis, not Lewis Mining Company.

record (Threatened and Endangered Species Clearance, dated Oct. 9, 1998) that one or more of the claims is a mill site.

On June 26, 1998, Lewis, as operator of the claims, filed a notice pursuant to 43 CFR 3809.1-3 describing surface disturbing activities of his proposed mining operation to take place on the claims. He estimated that the operation would encompass about five acres. Lewis stated that he planned to excavate placer material by use of a bobcat and backhoe and that the ore would be transported to a processing site where it would pass through grizzlies, hoppers, conveyors, centrifugal and gravity separators, and ball mills. He stated that he intended to use existing access roads with minor repair and listed his planned start date as July 11, 1998.

By letter dated October 2, 1998, BLM informed Lewis that his June 26, 1998, notice met the requirements of 43 CFR 3809.1-3 and had been accepted as filed. BLM noted that because he planned to move portable structures to the site, he had to comply with the regulations in 43 CFR Subpart 3715. BLM advised Lewis of the prohibition regarding gates, fencing, or means of restricting access to public lands, unless authorized in writing by BLM. BLM stated that the notice did not authorize residential occupancy of the project site.

On October 19, 1998, Lewis filed a notice of proposed occupancy for the LMC #1 claim, in accordance with 43 CFR 3715.2, 3715.2-1 and 3715.5. 2/ Lewis alleged that his occupancy would be reasonably incident to his mining activities and that occupancy would allow him to devote more time to developing and expanding his operation, rather than traveling from his home in San Diego, California. Lewis informed BLM that there would be a chain link fence surrounding the processing site and signs on the gate indicating that a mining operation was contained within and that physical hazards were present that might pose a danger to the public. Regarding access routes, Lewis stated that the existing public access road was some distance from the processing/occupancy site and traffic was not restricted in any way from normal travel. (Notice of Proposed Occupancy at 2.)

By letter dated July 15, 1999, BLM notified Lewis that his notice of proposed occupancy had been received on October 19, 1998, and that his occupancy was authorized for a period of 1 year from the date he received the letter. 3/ That action by BLM constituted its determination of

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2/ That notice of proposed occupancy does not appear in the case record. Nevertheless, the record does contain a BLM letter to Lewis, dated July 15, 1999, acknowledging receipt of a notice of proposed occupancy on Oct. 19, 1998. In addition, Lewis included an unsigned copy of the notice of proposed occupancy with his notice of appeal. Thus, we know what Lewis represented in that notice of occupancy.

3/ BLM sent that letter certified mail, return receipt requested, to the return address printed on Lewis' Oct. 15, 1998, notice of proposed occupancy. While that address differed from the one provided in Lewis' June 1998 notice, it represented the most recent address of record for him. Following two notices to appellant, the U.S. Post Office returned the letter to BLM marked "Unclaimed." BLM received it on Aug. 5, 1999. Under 43 CFR 1810.2(b), the notice is considered constructively received by Lewis

concurrence under 43 CFR 3715.3-4, which requires BLM, following its review of a proposed occupancy, to notify the claimant in writing of its "determination of concurrence or non-concurrence." BLM authorized the occupancy of a "temporary structure and gate" to prevent theft or loss of operable equipment and to protect the public from hazards created during Lewis' operation. BLM advised him that at the expiration of the one-year period, he would have to resubmit his notice of occupancy, if continued occupancy was required for his operation. BLM informed Lewis that during his occupancy, he would be required to comply with 43 CFR 3715.2, 3715.2-1, and 3715.5, which dictated, inter alia, that his activities be reasonably incident to mining.

BLM never received any further request for continued occupancy from Lewis. On February 9, 2000, BLM Surface Protection Specialist Gary Rowell inspected the site. Lewis was present during the inspection and four subsequent inspections by Rowell, which occurred prior to BLM's issuance of the decision in question.

In the field report of his first inspection, Rowell stated that, although there was mining equipment on the site, the only mining that had been completed had been by pick and shovel. However, Lewis had represented to Rowell that mining operations would commence within the next 30 days. Accompanying the field report are photographs documenting substantial improvements on the site and Lewis' full-time occupancy. One photograph shows a sign at the entrance to the mining claim which reads "Lewis Mining Co Active Mining Area Armed Patrol Private Property Keep Out." Rowell stated that he told Lewis that his occupancy had to be related to mining and that his sign had to be removed. In response to a question from Lewis inquiring about his letter of occupancy, Rowell informed Lewis that the letter had been sent to him and returned to BLM's office, but that the authorization covered only a one-year period.

The second inspection occurred on April 8, 2000. Rowell reported that there was more equipment on the site relating to mining, but there was no earth-moving equipment present. Rowell stated that Lewis told him that an operator with a dump truck and two bobcats would be arriving from Yuma to start operations. Rowell informed Lewis that if there were no operations, his occupancy would not be authorized, and he would be required to vacate the site. He noted that the sign had been modified to read "Lewis Mining Co Active Mining Area," and that "Armed Patrol Private Property Keep Out" had been removed.

In the field report of his third inspection on November 7, 2000, Rowell observed that Lewis had again added the term "Armed Patrol" to his

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fn. 3 (continued)
on that date, despite the lack of actual receipt. See William H. Snavely, 136 IBLA 350, 355 (1996); Fidelity Trust Building, Inc., 129 IBLA 57, 60 ! 61 (1994). In any event, Lewis was charged with knowledge of 43 CFR Subpart 3715 because all persons dealing with the Government are presumed to have knowledge of relevant statutes and regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

sign. He reminded Lewis that any signage would have to be approved by BLM and that the term "Armed Patrol" might be offensive to users of the public land. (Photograph 3.) Rowell stated: "I also told Mr. Lewis that a 55 gal drum in the wash with a no entry sign was not authorized and had to be removed, also approx. 75' from the barrel was a trailer for hauling automobiles [which] was chained to tree so as to block public access and Mr. Lewis was told it had to be removed." (Nov. 7, 2000, Field Report at 1; Photograph 4.) Photograph 2 of the report showed a post and cable erected on the site without authorization. Rowell reported that there had not been any mining or extraction-related activities on the claims, and that he had never seen Lewis working during any of the inspections. Inspection of the equipment revealed that it had not been operated and no material had been processed. Rowell stated his opinion that "the mining equipment on site is for show only and is there so that the claimant could occupy the site." Id. at 2. Rowell again told Lewis that his occupancy had to be reasonably incident to mining. Rowell noted that there was still no back hoe or crew on the site and the structure that was intended to store mining equipment contained mostly personal belongings.

The fourth inspection took place on December 2, 2000, at which time Rowell observed that there were still no signs of any activity relating to mining or extraction of minerals. Referring to photographs accompanying the report, he noted that the equipment was set up in the same spot and had not been operated. He reported that the "Armed Patrol" sign, the unauthorized post and cable with a padlock, the barrel with the no entry sign, and the trailer locked to a tree were still on the site. Rowell reported that he again told Lewis that these signs and barriers had to be removed because blocking or restricting public access to public lands is prohibited unless authorized by BLM. He noted that Lewis had not brought any earth-moving equipment onto the site as he said he would do during previous inspections.

After the fifth inspection on January 17, 2001, Rowell continued to report that there was no observable ongoing activity and that the mining equipment had not been used. He stated that the "Armed Patrol" sign, and the post and cable with padlock were still in place, and that the barrel with sign and trailer padlocked to the tree were still there restricting access to the public lands.

On June 12, 2001, BLM issued its decision, which it styled as "Notice of Immediate Suspension" 4/ which reads in pertinent part as follows:

4/ BLM originally issued this decision on Mar. 19, 2001, and sent it to Lewis by certified mail. It was returned to BLM on Apr. 13, 2001, by the postal service marked "Unclaimed." BLM then reissued the decision on Apr. 13, 2001, and attempted to hand deliver it to Lewis, but this attempt at delivery was also unsuccessful. On June 12, 2001, after having been given a new address by Lewis, BLM again reissued the decision. Lewis received it on June 13, 2001.

Routine field examinations conducted on December 2, 2000, and January 17, 2001, in Section 24, of T. 4 N., R. 21 W. La Paz County, Arizona, revealed the following:

1. A post and cable with a lock blocking the road leading to your occupancy which prevents entry by the public and restricts BLM personnel from gaining access for inspection purposes.

2. An unauthorized sign which states Lewis Mining Co. Armed Patrol.

3. The placing of a barrel in a wash with a Do Not Enter sign restricting public access.

4. A cargo trailer in a wash padlocked to a tree preventing public access.

A review of our records indicates the following facts:

1. During a routine field examination on December 2, 2000, Surface Protection Specialist, Gary Rowell informed you that the items 1, 2, 3, and 4 listed above were not authorized by the BLM, Yuma Field Office, and had to be removed.

2. During a routine field examination on January 17, 2001, it was noted that you did not:

A. Remove the padlocked post and cable,
B. Remove the Lewis Mining Co. Armed Patrol sign,
C. Remove the barrel and the do not enter sign, and
D. Remove the cargo trailer which was padlocked to the tree.

Based on our inspections and our files, your activity is unauthorized and is in violation of the Federal Land Policy and Management Act of 1976 (43 U.S.C. [1732]) and of 43 CFR 3715.3, 3715.3-1(a), 3715.4-2, 3715.5(a), 3715.5(b), 3715.5(c), 3715.5(d), 3715.5(e), and 3715.5-1. You have 15 days after receipt of this letter to remove all obstacles, barriers, and signs restricting access to and on public lands.

In his notice of appeal, Lewis asserts that BLM's statement that his post and cable prevents entry by the public and restricts BLM personnel from gaining access for inspection purposes is incorrect. Lewis claims that the road in question is "an authorized off-road access road" for his operations only, not a public road as defined by 43 CFR 3809.3-3(b). (Notice of Appeal at 1.) Citing 43 CFR 3809.1-3(b), Lewis asserts that the filing of a notice of proposed occupancy constitutes authorization of an off-road access road by a claim owner under 43 CFR Part 8340. Referring to 43 CFR 3715.6(f) and (g), Lewis contends that the cable is allowed as a reasonable security measure. He explains that it is not intended to

obstruct the free passage through the public lands, but rather to prevent thieves from driving onto the site and stealing his equipment. He points out that only he and BLM are authorized to have vehicles on this road, and that members of the public can easily walk around the cable. In order for BLM to have access to the site, Lewis suggests that BLM place a lock at the lock point and provide him with a key.

Regarding the trailer in the wash, Lewis asserts that the trailer is secured in order to prevent its theft, and the public may easily circumvent it. Again, he contends that the wash is an off-road access road for his operation. According to Lewis, the barrel in the same wash is a "forewarning to those who disregard the off-road vehicle laws and travel up the wash only to find out that there is no place to turn around." (Notice of Appeal at 2.) He notes that Rowell gained access past the barrel by driving around it.

Lewis asserts that the sign at the entrance to the site reads "Lewis Mining Co., Active Mining Claim, Armed Patrol," rather than "Lewis Mining Co. Armed Patrol," as stated by BLM in its decision. (Notice of Appeal at 2.) He contends that the sign is authorized by 43 CFR 3809.3-5, which permits signs to alert the public to conditions resulting from a mining operation. Responding to Rowell's statement that the words "Armed Patrol" might offend the public, Lewis argues that the Constitution allows him to be armed and to make this statement.

In its answer/motion to dismiss filed July 25, 2001, 5/ BLM asserts that, although an operator is entitled to access his mining operations under the surface management regulations at 43 CFR Subpart 3809, both the 1980 version of those regulations, as well as the 43 CFR Subpart 3809 regulations amended on November 21, 2000 (65 FR 69998), provide that access is generally not exclusive to the operator, but is considered an extension of public access consistent with mine health and safety regulations. 6/

BLM explains that in order to achieve its objective of reducing impacts on public lands from authorized activities, its custom and practice

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5/ In support of its motion to dismiss, BLM asserts that Lewis' reasons for appeal do not address the fact that the occupancy identified in its decision has not been authorized by BLM. BLM notes a statement of reasons that does not point out affirmatively the precise respects in which the decision being appealed is in error does not meet the requirements of the Department's rules of practice set forth at 43 CFR Part 4 and may be dismissed. (Answer at 14.) We find that Lewis' has provided reasons why he believes BLM's decision is in error. Therefore, BLM's motion to dismiss is denied. See 43 CFR 4.412(c).

6/ On Nov. 21, 2000, BLM amended its regulations governing mining operations for metallic and certain other hard rock minerals on public lands, including those at 43 CFR Subpart 3809. These regulations became effective Jan. 20, 2001. See 65 FR 69998. BLM again amended 43 CFR Subpart 3809 with publication of final rulemaking in the Federal Register on Oct. 30, 2001, effective Dec. 31, 2001. See 66 FR 54834.

has been to allow public access to all roads constructed by mine operators on public lands, unless access is restricted by either the Arizona State Mine Inspector and/or the Mine Safety and Health Administration. See Answer, Declaration of Gary Rowell (Ex. B), at 1-2.

BLM notes that despite several warnings by Rowell, Lewis did not remove the cable barricade on the road in question. Citing 43 CFR
3715.3-6, BLM states that an operator is required to obtain written concurrence from BLM before establishing or maintaining an occupancy. BLM asserts that the cable barricade is an occupancy as defined by 43 CFR 3715.0-5, and that Lewis did not have written concurrence from BLM for maintaining it. BLM concludes that Lewis is in violation of 43 CFR

3715.3-6. (Answer at 10-11.)

BLM states that after review of Lewis' October 15, 1998, notice of proposed occupancy and discussions with him, it agreed to allow an occupancy for a one-year period. However, BLM asserts that the October 15, 1998, notice falls short of meeting all information reporting requirements of 43 CFR 3715.3-2 because, according to BLM, it does not provide a written description of proposed occupancy. BLM states that it made a good faith attempt to work with Lewis by issuing a determination of concurrence and allowing him to develop his operation. See Answer at 11; Ex. B at 2-3.

BLM acknowledges that under 43 CFR 3715.2-1(b), an occupancy may be allowed as a measure to provide security to "appropriate, operable equipment which is regularly used, is not readily portable, and cannot be protected by means other than occupancy," but argues that the concurrence granted to Lewis based on his October 15, 1998, filing had expired in October 1999, prior to placing the cable across the road and blocking access. 7/ (Answer at 11-12; Ex. B at 3-4.)

Regarding the trailer in the wash, BLM states that the trailer is "occupancy" under 43 CFR 3715.0-5, and that Lewis' October 15, 1998, notice of proposed occupancy makes no mention of a trailer and how this trailer would be reasonably incident to mining-related activities as required by 43 CFR 3515.3-2(a). BLM notes that it has not concurred with this occupancy. (Answer at 13.)

BLM emphasizes that 43 CFR 3715.6(f) expressly prohibits "[p]reventing or obstructing free passage or transit over or through the public lands by force, threats, or intimidation; provided, however, that reasonable security and safety measures in accordance with this subpart are allowed." It is BLM's view that the "Armed Patrol" sign is designed to limit public access and constitutes an occupancy of the public lands under 43 CFR 3715.0-5. BLM contends that none of the "security" measures taken independently by Lewis and without concurrence from BLM constitutes reasonable measures in accordance with 43 CFR Subpart 3715. (Answer at
13-15.)

7/ BLM's concurrence authorization actually expired one year from Lewis' constructive receipt of it. See note 3, supra.

Section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (1994), provides that claims located under the mining laws of the United States "shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." In addition, 30 U.S.C. § 625 (1994) provides that all mining claims and millsites located on public lands "shall be used only for the purposes specified in section 621 of this title and no facility or activity shall be erected or conducted thereon for other purposes." BLM adopted 43 CFR Subpart 3715 to implement these statutory provisions by addressing the unlawful use and occupancy of unpatented mining claims or millsites for nonmining purposes. The regulations provide restrictions on the use and occupancy of public lands administered by BLM open to the operation of the mining laws, limiting such use and occupancy to prospecting or exploration, mining, or processing operations and reasonably incidental uses. The regulations clarify that unauthorized uses and occupancies on public lands are illegal uses that ipso facto constitute unnecessary or undue degradation of public lands which the Secretary of the Interior is mandated by law to take any action necessary to prevent. Firestone Mining Industries, Inc., 150 IBLA 104, 109 (1999). 8/

[1] First, we will examine the action taken by BLM in this case. The regulations at 43 CFR 3715.7-1 identify the four types of enforcement actions that BLM may take if the requirements of 43 CFR Subpart 3715 are being violated. They are issuance of (1) an immediate suspension (43 CFR 3715.7-1(a)), (2) a temporary cessation order (43 CFR 3715.7-1(b)), (3) a permanent cessation order (43 CFR 3715.7-1(b)), and (4) a notice of noncompliance (43 CFR 3715.7-1(c)).

[2] In this case, BLM issued a decision styled as a "Notice of Immediate Suspension." The regulations authorize BLM to order an "immediate, temporary suspension" in two circumstances: (1) all or part of the use or occupancy is not reasonably incident or is not in compliance with various listed regulations and "an immediate, temporary suspension is necessary to protect health, safety or the environment" (43 CFR 3715.7-1(a)(1)) or (2) occupancy is being conducted under a determination of concurrence and there is a failure to meet any of the standards in 43 CFR 3715.3-1(b) or 43 CFR 3715.5(b), (c), or (e), all of which relate to the obtaining of Federal, state, or local permits or approvals (43 CFR 3715.7-1(a)(2)). Under the second circumstance, BLM operates under the presumption that health, safety, or the environment are at risk.

8/ The preamble explains that the unnecessary or undue degradation controlled by these rules includes uses not authorized by law, specifically those activities which are not reasonably incident and are not authorized under any other applicable law or regulation, while uses that are reasonably incident and do not involve occupancy are governed by the surface management requirements of 43 CFR Part 3800. 61 FR 37118 (July 16, 1996).

[3] The second of these circumstances is inapplicable in this case because Lewis was not occupying the claim under a determination of concurrence at the time BLM issued its decision. Thus, an immediate suspension was appropriate only if the first circumstance obtains.

In its notice of immediate suspension, BLM informed Lewis that his activity on the claim was unauthorized and in violation of a number of regulations, including some of those listed in 43 CFR 3715.7-1(a)(1)(i). However, nowhere in the decision does BLM make a finding that "an immediate, temporary suspension is necessary to protect health, safety or the environment." 43 CFR 3715.7-1(a)(1)(ii). In the statement of Rowell, which accompanied BLM's answer as Exhibit B, he explained at

page 5 that "[t]he first enforcement priority of BLM must be, however, to those subpart 3715 occupancies which somehow constitute a danger, threat or serious concern to the public health, safety and welfare. The enforcement effort here was made strictly because, based on BLM's case file, just such a danger, threat, or serious concern from an occupancy exists." Despite this declaration from Rowell, our review of the record in this case fails to reveal the facts necessary to justify an immediate, temporary suspension of the uses and occupancies listed in the decision to protect health, safety or the environment. If, in fact, the padlocked post and cable, the "Armed Patrol" sign, the barrel with the no entry sign, and the cargo trailer padlocked to the tree constituted such a threat, an immediate, temporary suspension should have been issued in November 2000 following the field examination during which all these occupancies were reported. The fact that BLM waited until March 2001 (see note 4, supra) militates against any finding that these particular occupancies posed such a threat to health, safety, or the environment as to justify an immediate suspension. Thus, we conclude that the record in this case does not support the issuance of the notice of immediate suspension for the uses and occupancies listed therein.

However, there is no question that the record shows that none of the uses or occupancies detailed by BLM in its field inspection reports is reasonably incident to legitimate mining activities. 9/ And none of the arguments set forth by Lewis justifies his uses and occupancies. The attempts by Lewis to bar or discourage access to the claims are unwarranted. Although a mining claimant has a right of access to his mining claims, such access is not exclusive. See Mosch Mining Co., 75 IBLA 153, 159-61, 90 I.D. 382, 386-87 (1983). It is subject to regulation under

9/ The case file contains photographs documenting that the site in question contained a travel trailer used by Lewis as a residence, an unauthorized septic system, a water storage tank, a storage facility, barrels used for water and fuel storage, and miscellaneous materials scattered around the area. See photographs accompanying Field Inspection Report dated Jan. 17, 2001. While BLM did not detail any of these uses or occupancies in its notice of immediate suspension, it is just such uses and occupancies, and the others listed in the notice, in their totality (especially the unapproved septic system), which could support an order of immediate suspension to protect health, safety, or the environment.

BLM's rules governing use and occupancy under the mining laws. 43 CFR Subpart 3715.

"Occupancy" is defined in 43 CFR 3715.0-5 as meaning "full or part-time residence on public lands" in permanent or temporary structures. "Residence or structures include, but are not limited to, barriers to access * * *." Id. Thus, under proper circumstances, with the approval of BLM, a claimant could maintain "barriers to access." However, absent approval from BLM, "[p]lacing, constructing, or maintaining enclosures, gates, or fences, or signs intended to exclude the general public" is prohibited. 43 CFR 3715.6. In its July 15, 1999, concurrence letter, BLM authorized the occupancy of "a temporary structure and gate" in order to protect equipment from theft. Thus, while Lewis had received authorization to place a "gate" on the claim, that authorization expired in August 2000, prior to the issuance of the challenged decision.

To the extent the padlocked post and cable may be considered a "gate," Lewis may have had authority to erect it, if in fact it were erected prior to expiration of his authorization. There is no mention in the report of the April 2000 field inspection of the padlocked post and cable. It appears for the first time in the report of the next field inspection in November 2000, after the expiration of his authorization in August 2000. Therefore, at the time BLM issued its decision, Lewis had no authorization to maintain the padlocked post and gate on public land. Nor is there any evidence that the "Armed Patrol" sign, the barrel with the no entry sign, and the cargo trailer, which was padlocked to the tree, were authorized by BLM. All those occupancies and all other occupancies detailed in BLM's field reports were, at the time BLM issued its decision, being maintained without authorization. Furthermore, under 43 CFR 3715.5(a), Lewis' use and occupancy must be "reasonably incident" to mining. BLM's regulations define "reasonably incident" as being "prospecting, mining, or processing operations and uses reasonably

incident thereto" and "includes those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit * * *." 43 CFR 3715.0-5. Lewis has made no showing that any of his uses or occupancies are "reasonably incident" to mining under this standard. Lewis has not presented any evidence that he has done anything on the site with respect to "prospecting, mining, or processing operations and uses reasonably incident thereto." Therefore, the barriers and signs found on the site, as well as all other uses and occupancies documented in the record, are not justified. See William L. Hulse, 153 IBLA 362, 369 (2000); Bradshaw Industries, 152 IBLA 57, 63 (2000). In fact, the evidence in this case is that Lewis is merely maintaining a residence on public land, which is not reasonably incident to mining.

The suggestion that a common lock be installed to allow BLM access to the claim clearly is not appropriate in this instance. In Mosch Mining Co., supra, the appellant installed a gate to provide protection for the mine and equipment, and the county sheriff's department and BLM had keys to the gate. The Board noted that the procedure for barring public access, while affording access to a claimant by installing a gate with multiple

locks, is proper in those cases where BLM determines that the public interest is best served by road closure. The Board stated that this practice is often invoked in cases where surface management is best served by limiting vehicular access. Mosch Mining Co., supra at 155, 161 n. 4, 90 I.D. at 383, 387 n. 4. No such determination has been made in this case, nor is it justified by the record.

We note that on appeal BLM contends that 43 CFR 3715.6(f) supports removal of the "Armed Patrol" sign because that regulation prohibits the obstruction of free passage over or through public lands by force, threats, or intimidation. BLM asserts that the sign is not a reasonable security measure. The regulation relied on by BLM, however, was not one of the regulations cited by BLM in its decision as having been violated.

Lewis questions why BLM has failed to take enforcement action against other claimants in the area who have access roads which are cabled and locked. These matters are beyond the scope of this appeal, which only concerns Lewis' use and occupancy. But as BLM correctly points out in its answer, the fact that BLM may not have taken action in the past on certain facts does not precluded it from taking action on similar facts in the future with respect to this or any other claimant/operator.

By regulation the Secretary has determined the circumstances under which action to enforce violations will be undertaken. Since Lewis' use and occupancy does not meet the requirements of the regulations, BLM clearly had the authority to take enforcement action. However, as noted above, the particular action taken in this case is not justified by the record. Accordingly, we must set aside BLM's decision issuing the notice of immediate suspension and remand the case to BLM for issuance of the appropriate enforcement action, which should detail all of Lewis' unauthorized uses and occupancies.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed is set aside and the case remanded for action consistent with this opinion.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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C. Randall Grant, Jr.
Administrative Judge